

January 26, 1999

TO: All Users of the ALRB Case Digest

FROM: J. Antonio Barbosa, Executive Secretary

SUBJECT: ***Supplement to Case Digest***

Attached is a supplement to the ALRB Case Digest, to be used in conjunction with the digest issued in January of 1994 and the earlier supplement issued in July of 1997. The new supplement covers all Board decisions in Volumes 23 (1997) and 24 (1998), and all published court decisions issued from July 1, 1997 through December 31, 1998.

Please let me know if you become aware of any errors or omissions in the digest or supplements so that they may be corrected prior to the next supplement.

Thank you.

ALRB CASE DIGEST SUPPLEMENT

23 ALRB NOS. 1-10 (1997)
24 ALRB NOS. 1-7 (1998)

COURT DECISIONS 7/1/97 - 12/31/98

102.00 SCOPE OF ALRB JURISDICTION

102.01 In General

102.01 Employee who spends substantial amount of time hauling firewood cut from employer's ranches is engaged in "forestry or lumbering operations" and is therefore an agricultural employee as to that work.

WARMERDAM PACKING CO., 24 ALRB No. 2

102.01 ALRB has jurisdiction over employees found to be engaged in agriculture even though NLRB has found, based on vastly different facts, that at a later time the employees were under NLRB jurisdiction. Under the facts before the NLRB, the employer regularly processed other farmers' eggs, while during the period covered by the ALRB decision, the employer stipulated that outside eggs were used only on a rare and emergency basis (see *Camsco Produce Co., Inc.* (1990) 297 NLRB 905).

OLSON FARMS, INC. v. BARBOSA, ET AL., 134 F.3d 933 (1998)

202.00 WHO IS AN EMPLOYER?

202.09 Agents

202.09 Although irrigator/truck driver who often directed day-to-day work and had general authority to put people to work who had worked the prior season was not a statutory supervisor, employees would reasonably have perceived him as acting as the employer's agent in making threats that employer was going to plant very little acreage and would hire only non-union supporters the following year. Under standards of *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, an employer may be held responsible for unlawful conduct by a non-supervisor even if the employer did not direct, authorize or ratify the conduct if the non-supervisor has apparent authority to speak for the employer.

TSUKIJI FARMS, 24 ALRB No. 3

202.09 Irrigator/truck driver who in prior years had notified returning workers when they could start working, was acting as employer's agent in discouraging discriminatees from following new hiring procedure by telling them they probably would not get work because of their

union activities.

TSUKIJI FARMS, 24 ALRB No. 3

204.00 **SUPERVISORS**

204.03 Assignments or Direction of Work; Adjustment of Grievances; Independent Judgement; Responsibility

204.03 Irrigator/truck driver who often directed day-to-day work and had general authority to put people to work who had worked the prior season, was not a statutory supervisor since he did not have authority to exercise discretion or independent judgment over hiring, discharge, discipline, or direction of employees.

TSUKIJI FARMS, 24 ALRB No. 3

204.04 Authority or Recommendations as to Hiring, Firing, Discipline, Promotion, etc.; Rating of Subordinates

204.04 Irrigator/truck driver who often directed day-to-day work and had general authority to put people to work who had worked the prior season, was not a statutory supervisor since he did not have authority to exercise discretion or independent judgment over hiring, discharge, discipline, or direction of employees.

TSUKIJI FARMS, 24 ALRB No. 3

300.00 **QUESTION CONCERNING REPRESENTATION**

300.01 In General, Labor Code Sections 1156-1159

300.01 Requirements for a bona fide question concerning representation, as set forth in section 1156.3(a)(1) et seq., are not "a jurisdictional prerequisite to Board action; [but] rather...an administrative expedient for determination of whether, generally, further proceedings are warranted." (Citation)

COASTAL BERRY FARMS, LLC., 24 ALRB No. 4

302.00 **PRE-PETITION MATTERS**

302.01 Notice Of Intent To Take Access; Precertification Access (see section 401)

302.01 Travel time, i.e., the time it takes for either the employees or the union organizers to travel to the location where the actual communication takes place does not count against a union's allotted time for access.

GARGIULO, INC., 23 ALRB No. 5

302.01 Union organizer showed intentional or reckless disregard for the access rules when he led a

group of union supporters onto the employer's property in numbers in excess of those authorized by the access regulation. Appropriate remedy is barring access by organizer in region for a specified 60-day period.

GARGIULO, INC., 23 ALRB No. 5

302.01 The access regulation gives a union a limited right to solicit support from employees on the employer's property and it may only bring a limited number of people onto the property to carry out this mission. It is therefore reasonable to hold a union responsible for whomever it invites in with it during access and to prohibit the use of access time for other purposes, such as union-led or sponsored demonstrations, even if some or all of the participants had a right to enter the property if not acting as agents of the union.

GARGIULO, INC., 23 ALRB No. 5

302.01 Since the access regulation itself, at section 20900(e)(4)(C), states that speech alone shall not constitute disruptive conduct, and the access rule is not intended to regulate the content of the union's message, in the absence of evidence of disruption of work, the shouting of obscenities does not constitute a violation of the access regulation.

GARGIULO, INC., 23 ALRB No. 5

302.01 The access period may be staggered when groups of employees finish working at different times. Therefore, organizers did not show intentional or reckless disregard for access rules by remaining on property well after proper end of access period where evidence showed that some employees left fields well after the time asserted in the motion to deny access.

GARGIULO, INC., 23 ALRB No. 5

302.01 Pursuant to Regulation 20900, subdivision (e)(1)(B), each thirty-day access period does not commence until the NA (previously served on the employer) is filed in the appropriate regional office.

MEHL BERRY FARMS, 23 ALRB No. 9

302.05 Motions To Deny Access

302.05 Substantive requirements for a motion to deny access, as set out in

Ranch No. 1, Inc. (1979) 5 ALRB No.36, may be read in disjunctive so that any one of three elements set forth therein will be sufficient to find a violation and warrant a denial of access.

NAVARRO FARMS, 23 ALRB No. 1

302.05 Where the Board granted motion to deny access and found organizers had violated rule by

using access for purposes other than primarily to communicate with employees, the Board issued a standard cease and desist order as well as a prohibition against the union's taking of access for a 30-day period in the subsequent season.

NAVARRO FARMS, 23 ALRB No. 1

302.05 Violation of access rule where organizers take access for primary purpose of inspecting facilities employer provides for employees and then advising employers of alleged infractions of Cal-OSHA regulations, even though organizers otherwise in compliance with rule.

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RAMIREZ FARMS, 23 ALRB No. 3

302.05 Union organizer showed intentional or reckless disregard for the access rules when he led a group of union supporters onto the employer's property in numbers in excess of those authorized by the access regulation. Appropriate remedy is barring access by organizer in region for a specified 60-day period.

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the participants had a right to enter the property if not acting as agents of the union.
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302.05 The access period may be staggered when groups of employees finish working at different times. Therefore, organizers did not show intentional or reckless disregard for access rules by remaining on property well after proper end of access period where evidence showed that some employees left fields well after the time asserted in the motion to deny access.
GARGIULO, INC., 23 ALRB No. 5

302.05 Statement by organizer that he would decide when it was time to leave the employer's property did not reflect intentional or reckless disregard of access rules where, in light of context of statement and failure to prove more serious statement attributed to the organizer a day earlier, the statement took on an innocuous character.
GARGIULO, INC., 23 ALRB No. 5

302.05 Motion to deny post-certification access under Board regulation section 20900 is denied on grounds that the regulation governs only organizational access, not post-certification access. (L & C Harvesting, Inc. (1993) 19 ALRB No. 19; D'Arrigo Brothers, Admin. Order No. 91-7; The Herb Farm, Admin. Order No. 91-5.)
TRIPLE E PRODUCE CORP., 23 ALRB No. 6

302.05 Union response to motions to deny access eliminated, since no such response permitted with regard to analogous procedure governing the screening of election objections and, in light of fact moving party's declarations are presumed true for purposes of determining whether a hearing is warranted, such responses are irrelevant at that stage of the proceeding.
MEHL BERRY FARMS, 23 ALRB No. 9

302.05 Since the requirements for a prima facie case set forth in Dutra Farms include declarations within the personal knowledge of the declarant, sheriff's report relating what witnesses told him is not considered in determining whether to set the matter for hearing.
MEHL BERRY FARMS, 23 ALRB No. 9

302.05 Taking of access prior to filing NA with the regional office (which triggers beginning of access period) and statements of organizers that they did not care if the NA had been filed

sufficient to warrant hearing as to whether organizers exhibited intentional or reckless disregard for access regulation.

MEHL BERRY FARMS, 23 ALRB No. 9

302.05 Threats in and of themselves, though deplorable, do not violate the access rule. Instead, intentional harassment is established where the facts reflect that union agents took access not with the intent to communicate with employees and gather their support, but with an ulterior motive to harass. The election objection and unfair labor practice processes are better suited to deal with allegations of threats and other unprotected speech.

MEHL BERRY FARMS, 23 ALRB No. 9

303.00 **PEAK**

303.01 In General; Labor Code Section 1156.4; Crop And Acreage Statistics

303.01 Board reaffirms the position it asserted in Gallo Vineyards (1995)

21 ALRB No. 3, wherein it rejected the employer's contention that section 1156.4 mandates the Board to develop uniform statewide crop and acreage statistics to assist in making peak determinations; also reaffirms practice of evaluating prospective peak on the basis of whether Regional Director's decision to go forward with election was reasonable in light of information available at the time. Moreover, it is the responsibility of employers who contend representation petition not timely filed on the basis of future peak to provide information to support such claim.

GALLO VINEYARDS, INC., 23 ALRB No. 7

303.03 Prospective Peak

303.03 Contrary to Respondent's contention, while section 1156.4 only prohibits the Board from applying averaging to the number of employees on the pre-petition payroll, Board may continue to measure prospective peak by the averaging method.

GALLO VINEYARDS, INC., 23 ALRB No. 7

303.03 Board reaffirms the position it asserted in Gallo Vineyards (1995)

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313.00 **CIRCUMSTANCES DETERMINING PROPRIETY OF ELECTION**

313.03 Representative Character Of Workforce; Peak; Voter Turnout

313.03 Contrary to Respondent's contention, while section 1156.4 only prohibits the Board from applying averaging to the number of employees on the pre-petition payroll, Board may continue to measure prospective peak by the averaging method.

GALLO VINEYARDS, INC., 23 ALRB No. 7

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GALLO VINEYARDS, INC., 23 ALRB No. 7

314.00 **METHOD OF CONDUCTING ELECTION**

314.17 Board Agent Bias or Appearance of Bias

314.17 Objections alleging that Board agents allowed union agents to engage in improper electioneering at or near the polls dismissed where allegations of electioneering were themselves insufficient to warrant setting matter for hearing.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

316.00 **EMPLOYER INTERFERENCE WITH ELECTIONS**

316.06 Misrepresentations

316.06 Board defers deciding whether it must follow the NLRB's rule against entertaining election objections based on misrepresentations unless a party has forged documents or altered NLRB documents during the election campaign. (Midland National Life Insurance Co. (1982) 263 NLRB 127; Acme Bus Corp. (1995 316 NLRB 274 (elections will be set aside only "if a party misrepresented the facts or the law by forging documents, thereby

deceiving the voters, and rendering them unable to recognize the propaganda for what it is.") Board need not decide whether contested statements by employer constituted misrepresentation and thus interference because UFW had notice and opportunity to diffuse or explain away the alleged misrepresentation prior to the decertification election.

OCEANVIEW PRODUCE CO., 24 ALRB No. 6

**317.00 PARTICIPATING UNION'S OR EMPLOYEE INTERFERENCE
WITH ELECTION**

317.01 In General; Standards Applied to Party and Non-Party Conduct

317.01 Election objection alleging that union organizers breached pre-election agreement to have employees vote one crew at a time and instead told all employees to come in and vote dismissed for failure to indicate how such conduct could have affected free choice in the election.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

317.06 Statements; Threats; Inducements; Waiver of Initiation Fee or Dues

317.06 Allegation of threats dismissed for failure to meet requirements of Regulation 20365 where supporting declarations failed to provide content of the threats, the identity of those hearing the threats, or the identity of those making the threats.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

317.08 Union Agents At or Near Polls

317.08 Without specific content of "pro-union slogans" shouted at voters near polling area prior to actual balloting it cannot be concluded that the conduct was coercive or threatening. Moreover, campaigning in or near the polling area prior to the actual balloting is not a sufficient ground for setting aside an election.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

317.08 The Board will not set aside an election due to electioneering at or near the polling place on a "per se" basis, but will instead examine whether the conduct was so coercive or disruptive as to interfere with free choice in the election to the extent that it might have affected the outcome of the election. The mere shouting of pro-union slogans does not constitute such coercive or disruptive conduct.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

317.14 Campaigning or Conversations at Polling Site

317.14 Without specific content of "pro-union slogans" shouted at voters near polling area prior to actual balloting it cannot be concluded that the conduct was coercive or threatening.

Moreover, campaigning in or near the polling area prior to the actual balloting is not a sufficient ground for setting aside an election.

ANDERSON VINEYARDS, INC., 24 ALRB No. 5

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ANDERSON VINEYARDS, INC., 24 ALRB No. 5

323.00 **HEARINGS**

323.02 Investigative Hearing Examiners; Bias; Disqualification; Power To Control Hearing

323.02 Employer failed to demonstrate that ALJ should be disqualified for bias. Statistical arguments concerning the number of rulings an ALJ has made against a litigant (or class of litigants) do not tend to establish bias. (Fieldcrest Cannon, Inc. v. NLRB (4th Cir. 1996) 97 F.3d 665 [153 LRRM 2385].) Moreover, employer did not show that ALJ's rulings in the instant case were based on bias rather than impartial evaluation of the evidence.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

324.00 **ELECTION OBJECTIONS PROCEDURE**

324.02 Screening For Prima Facie Case; Right To Hearing; Dismissal Without Hearing; Appeal

324.02 In considering whether to set election objections, employers properly excluded hearsay statements because they alleged facts not within the declarant's personal knowledge, and thus failed to comply with Board regulation 20365.

GILROY FOODS, INC., 23 ALRB No.10

324.02 Executive Secretary properly dismissed election objection claiming voters were confused by UFW representative's statement that voters should "vote-in" the UFW rather than the "Salinas union." Since only the petitioning union, and not the UFW, could have appeared on the ballot, reasonable voters would not have been confused about what

were the actual choices on the ballot.

GILROY FOODS, INC., 23 ALRB No.10

324.02 Executive Secretary properly dismissed election objection claiming that Board agents gave inadequate notice of election, since Regional Director is required to give only as much notice of an election as is reasonably possible under the circumstances of each case (J. Oberti, Inc. (1984) 10 ALRB No. 50), and employer failed to show that an outcome determinative number of voters was disenfranchised (R.T. Englund Company (1976) 2 ALRB No. 23).

GILROY FOODS, INC., 23 ALRB No.10

324.03 Who May File Objections

324.03 Majority follows NLRB which permits election objections to be filed only by parties to the election; i.e., the petitioner, the employer involved in the election, and any intervening or cross-petitioning labor organization(s). Accordingly, an individual employee, although a member of the unit, is not a "party" and therefore is not a "person" with an interest in the outcome of the proceeding within the meaning of section 1140.4(d).

COASTAL BERRY FARMS, LLC., 24 ALRB No. 4

324.03 Majority criticizes Herbert Buck Ranches, Inc. (1975) 1 ALRB No. 6 which held that a union not on the ballot could nevertheless file certain types of election objections, such as one challenging the finding of peak. Board suggests that its own regulatory and case law developments since Buck issued have impliedly if not expressly overruled both the holding and the reasoning of Buck.

COASTAL BERRY FARMS, LLC., 24 ALRB No. 4

324.03 Following Herbert Buck Ranches, Inc. (1975) 1 ALRB No. 6, dissent holds that all of the requirements for a bona fide question concerning representation as set forth in section 1156.3(a) (1) through (4) are statutory prerequisites and therefore "any person" has standing to file election objections challenging the sufficiency of those requirements for the holding of the election.

COASTAL BERRY FARMS, LLC., 24 ALRB No. 4

402.00 **QUESTIONING EMPLOYEES; INTERROGATION**

402.03 Union Activities or Membership

402.03 Owner of company did not unlawfully interrogate employees where he asked a group of employees why they were supporting the union and whether he wasn't a good boss,

where owner did not seem to expect an answer but instead was expressing concern and frustration, and any possible coercive effect was mitigated by owner's son immediately signaling his father to stop.

TSUKIJI FARMS, 24 ALRB No. 3

403.00 **SURVEILLANCE**

403.06 Management Representatives At Or Near Union Meetings

403.06 Company supervisors did not engage in surveillance of employees' union activities taking place in a public park, where supervisors were conducting legitimate business across the street from the park, were not closely monitoring the employees' activities, and evidence did not establish that they remained near the union gathering for any significant amount of time after their legitimate business was done.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

405.00 **THREAT OR PROMISE, WHAT CONSTITUTES**

405.02 Discharge, Layoff, or Demotion Threatened

405.02 Although irrigator/truck driver who often directed day-to-day work and had general authority to put people to work who had worked the prior season was not a statutory supervisor, employees would reasonably have perceived him as acting as the employer's agent in making threats that employer was going to plant very little acreage and would hire only non-union supporters the following year. Under standards of *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, an employer may be held responsible for unlawful conduct by a nonsupervisor even if the employer did not direct, authorize or ratify the conduct if the nonsupervisor has apparent authority to speak for the employer.

TSUKIJI FARMS, 24 ALRB No. 3

405.04 Shutdown, Curtailment of Operations, Plant Removal, Work Transfer, Subcontracting or Sale Threatened

405.04 No unlawful threat of shutdown of operations and loss of work if union won election where supervisor credibly denied making such statements.

WARMERDAM PACKING CO., 24 ALRB No. 2

405.04 Labor consultant who told employees that several companies in the area had gone out of business because the union had come in, and that the same thing could happen to them, made an unlawful threat, because a reasonable person would draw the conclusion that supporting the union could lead to the employer closing. An employer may make predictions as to the effects it believes unionization will have on the company, but the predictions must be carefully based on objective facts demonstrating probably

consequences beyond the employer's control. (*NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575.)

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TSUKIJI FARMS, 24 ALRB No. 3

414.00 **EMPLOYER DISCRIMINATION IN REGARD TO EMPLOYMENT**

414.01 In General; Labor Code Section 1153(c); Elements of Prima Facie Case

414.01 Since change in classification occurred six months before protected activity, change could not have been designed to prevent employee from voting.

WARMERDAM PACKING CO., 24 ALRB No. 2

414.01 Knowledge of union activity not imputed where credited testimony indicates that the information was not passed on to higher officials in company who made the decision to take the adverse actions complained of. Foremen's knowledge that alleged discriminatees were leaders of organizing effort not imputed where respondent's denials of knowledge credited, evidence showed that foremen were sympathetic to the organizing effort, and organizing otherwise was "secret."

WARMERDAM PACKING CO., 24 ALRB No. 2

414.01 No prima facie case of layoff in retaliation for union activities where layoff not close in time to union activities, no evidence of collateral unfair labor practices, no credited expressions of animus, and individual layoff part of larger, seasonal layoff.

WARMERDAM PACKING CO., 24 ALRB No. 2

414.01 No prima facie case of refusal to rehire where refusal to rehire remote in time from union activity, no context of other unlawful conduct, and testimony concerning statement of anti-union animus not credited.

WARMERDAM PACKING CO., 24 ALRB No. 2

414.04 Discrimination Based on Protected Concerted Activity;
Labor Code Section 1153(a)

414.04 Notwithstanding employees concerted' wage protest and employer decision to lay them off just hours later, no violation where employer established valid business reasons for mass reduction in overall crew size due to unseasonal weather conditions.

DUTRA FARMS, 24 ALRB No. 1

416.00 **REFUSAL TO HIRE, OR DISCOURAGING HIRE OF UNION MEMBERS OR SYMPATHIZERS**

416.01 In General

416.01 Employer discriminatorily refused to hire group of union supporters where it changed its hiring procedures without notice, which precluded workers from making timely application and disparately impacted union supporters.

TSUKIJI FARMS, 24 ALRB No. 3

416.01 Although General Counsel generally must establish that alleged discriminatees applied for work at a time when work was available, when an employer has made clear its discriminatory policy not to rehire a particular group of persons, each member of the defined group need not undertake the futile gesture of offering in person to return to work. (*Duke Wilson Company* (1986)
12 ALRB No. 19.)

TSUKIJI FARMS, 24 ALRB No. 3

416.01 Employer violated section 1153(c) and (a) by refusing to hire predecessor's employees. Employer was entitled to hire its own previous employees first, but violated the law when it hired new employees and still refused to hire the predecessor's employees for discriminatory reasons.

GREWAL ENTERPRISES, INC., 24 ALRB No. 7

416.03 Former Employees; Seasonal Workers

416.03 No prima facie case of refusal to rehire where refusal to rehire remote in time from union activity, no context of other unlawful conduct, and testimony concerning statement of anti-union animus not credited.

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12 ALRB No. 19.)

TSUKIJI FARMS, 24 ALRB No. 3

416.05 Group Discrimination

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TSUKIJI FARMS, 24 ALRB No. 3

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TSUKIJI FARMS, 24 ALRB No. 3

417.00 **DISCHARGE AND LAYOFFS**

417.01 Discharge In General

417.01 Employee was not discriminatorily discharged when foreman told him he could not continue working while intoxicated. Reasonable employee would not have believed he was discharged but only that he could not continue working in his intoxicated condition.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

417.04 Layoffs In General; Permanent or Temporary Layoffs; Disciplinary Layoff

417.04 No prima facie case of layoff in retaliation for union activities where layoff not close in time to union activities, no evidence of collateral unfair labor practices, no credited expressions of animus, and individual layoff part of larger, seasonal layoff.

WARMERDAM PACKING CO., 24 ALRB No. 2

417.04 Evidence indicates that employer's layoff was not discriminatory where employer decided to disk under acreage infested with mites and fungus, and employer was concerned that without a layoff, shorter hours would cause employees to seek work elsewhere, thus providing no assurance that employer would have enough employees remaining until the end of the harvest.

TSUKIJI FARMS, 24 ALRB No. 3

419.00 **CHANGE IN OR DISCONTINUANCE OF OPERATIONS FOR
DISCRIMINATORY REASONS**

419.10 Hours and Overtime, Work Schedules

419.10 No discriminatory change in hours or overtime where variation in hours not unusual and in months directly after protected activity double overtime hours increased.

WARMERDAM PACKING CO., 24 ALRB No. 2

419.11 Working Conditions and Employee Privileges

419.11 No finding of discriminatory warnings to speak only English to supervisor or not to speak to other employees where supervisor credibly denied making such statements.

WARMERDAM PACKING CO., 24 ALRB No. 2

420.00 **REASONS FOR DISCIPLINE, DISCHARGE, OR REFUSAL TO REINSTATE**

420.07 Damage to or Loss of Machines, Materials, Crops, etc.

420.07 No unlawful discharge proven where evidence showed that employee did damage machinery

and falsify timesheets, which were stated reasons for discharge, and where no other evidence of pretext.

WARMERDAM PACKING CO., 24 ALRB No. 2

420.08 Dishonesty, False Statements, Theft, or Disloyalty to Employer

420.08 No unlawful discharge proven where evidence showed that employee did damage machinery and falsify timesheets, which were stated reasons for discharge, and where no other evidence of pretext.

WARMERDAM PACKING CO., 24 ALRB No. 2

420.21 Reduction or Redistribution of Work; Elimination of Jobs;
Availability of Work After Discharge or Layoff; Automation

420.21 Notwithstanding employees concerted' wage protest and employer decision to lay them off just hours later, no violation where employer established valid business reasons for mass reduction in overall crew size due to unseasonal weather conditions.

DUTRA FARMS, ALRB No. 1

421.00 **BACKGROUND CIRCUMSTANCES INDICATION OR REBUTTING
DISCRIMINATION IN DISCIPLINE, DISCHARGE, LAYOFF, OR
REFUSAL TO REINSTATE**

421.07 Knowledge of Employee's Union Activities, Proof of; Surveillance or Questioning

421.07 Knowledge of union activity not imputed where credited testimony indicates that the information was not passed on to higher officials in company who made the decision to take the adverse actions complained of. Foremen's knowledge that alleged discriminatees were leaders of organizing effort not imputed where respondent's denials of knowledge credited, evidence showed that foremen were sympathetic to the organizing effort, and organizing otherwise was "secret."

WARMERDAM PACKING CO., 24 ALRB No. 2

423.00 **CONCERTED ACTIVITIES; PROTECTED ACTIVITIES**

423.07 Wage Demands; Demands for Change in Working Conditions

423.07 Notwithstanding employees concerted' wage protest and employer decision to lay them off just hours later, no violation where employer established valid business reasons for mass reduction in overall crew size due to unseasonal weather conditions.

DUTRA FARMS, ALRB No. 1

432.00 **REFUSAL OF EMPLOYER TO BARGAIN COLLECTIVELY
IN GOOD FAITH**

432.02 Refusal To Bargain For Purpose Of Obtaining Judicial Review; Technical Refusal To Bargain
(see also section 463.03)

432.02 Where employer did not follow the normal route of review of the Board's decision in a representation matter, but instead sought Leedom v. Kyne direct review in the superior court, Board took into account the likelihood that employer would not prevail on that basis when deciding to invoke the makewhole remedy.

GALLO VINEYARDS, INC., 23 ALRB No. 7

432.02 Where employer's attempt to invoke narrow Leedom v. Kyne standard as grounds for direct review of Board's certification decision raised issues it could have properly asserted before Board and court of appeal on the merits under the broader standard of review, Board could conclude that trial court action was filed for the sole purpose of delaying the bargaining obligation.

GALLO VINEYARDS, INC., 23 ALRB No. 7

432.02 Where review of election certification was available by the normal process of a technical refusal to bargain first before the Board and then in the court of appeal, Respondent failed to demonstrate the need for an extraordinary remedy in equity by its effort to seek direct review in the superior court.

GALLO VINEYARDS, INC., 23 ALRB No. 7

432.02 Where Respondent is on notice that its arguments had previously been considered and rejected by various courts of appeal, filing of Leedom v. Kyne action in superior court did not reflect good faith litigation.

GALLO VINEYARDS, INC., 23 ALRB No. 7

436.00 **INFORMATION TO UNION; DATA FOR BARGAINING OR CONTRACT
ADMINISTRATION**

436.01 In General; Relevance Of Information To Collective Bargaining

436.01 Employer violated section 1153(e) by refusing to provide union with information relevant to 436.07 bargaining, including seniority lists, addresses, dates of hire and social security numbers of workers, maps of company property, number of acres and products farmed, average hours of workers, names and titles of company representatives, and percentage of compensation paid to labor contractors.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

436.02 Delay Or Refusal To Provide Information As Unfair Labor Practice

436.02 Employer violated section 1153(e) by refusing to provide union with information relevant to 436.07 bargaining, including seniority lists, addresses, dates of hire and social security numbers of workers, maps of company property, number of acres and products farmed, average hours of workers, names and titles of company representatives, and percentage of compensation paid to labor contractors.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

436.07 Subjects (Except Wages) On Which Information Is Sought; Names And Addresses; Time Studies, Etc.

436.07 Employer violated section 1153(e) by refusing to provide union with information relevant to 436.07 bargaining, including seniority lists, addresses, dates of hire and social security numbers of workers, maps of company property, number of acres and products farmed, average hours of workers, names and titles of company representatives, and percentage of compensation paid to labor contractors.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

442.00 **UNION UNFAIR LABOR PRACTICES; RESTRAINT OR COERCION**

442.02 Employee's Right To Refrain From Concerted Activities

442.02 General Counsel failed to establish that UFW agents taking post-certification access unlawfully restrained or coerced employees by addressing the employees through a bullhorn, videotaping employees as they worked, entering fields at times not authorized by private party access agreement and in numbers exceeding the number permitted by the agreement, yelling at supervisors in the presence of employees, or entering fields with persons who were not Union representatives and in some cases giving them badges to wear which falsely identified them as Union representatives. Although Union's conduct was disrespectful of employees and the employer, it was not sufficiently egregious to constitute an unfair labor practice.

UNITED FARM WORKERS OF AMERICA, AFL-CIO
(Triple E Produce Corp.), 23 ALRB No. 4

454.00 **SETTLEMENT AND STIPULATIONS; APPEAL FROM**

454.01 In General

454.01 Board affirms ALJ's dismissal of bargaining allegations after parties reach a private party settlement, under which employer agreed to recognize Union as exclusive representative

of the workers on acreage previously farmed by employer's predecessor.
GREWAL ENTERPRISES, INC., 24 ALRB No. 7

455.00 **ADMINISTRATIVE LAW JUDGES' DECISIONS**

455.02 Exceptions; Response; Cross-Exceptions

455.02 Board has declined to dismiss exceptions where compliance with Regulation 20282, subdivision (a)(1), is sufficient to allow the Board to identify the exceptions and the grounds therefor and to address them on their merits.
WARMERDAM PACKING CO., 24 ALRB No. 2

457.00 **BOARD DECISIONS**

457.08 Rulemaking Powers, Labor Code Section 1144

457.08 Formal rulemaking procedures are not the exclusive method for statutory interpretation; Board may proceed by adjudication on a case by case basis; Board not bound to follow regulation found invalid by appellate court until regulation formally changed.
GALLO VINEYARDS, INC., 23 ALRB No. 7

459.00 **REINSTATEMENT AND BACKPAY**

459.09 Availability of Work; Reduction in Workforce or Elimination of Jobs as Affecting Reinstatement

459.09 Evidence indicates there were apparently not enough jobs available to offer re-employment to all discriminatees denied rehire even if the employer had hired workers in a totally non-discriminatory manner. Therefore, Board's remedial order will require employer to offer reinstatement to those discriminatees who would currently be employed but for employer's unlawful refusal to rehire them, and to make whole all those who suffered economic losses as a result of employer's refusal to rehire them. The matter of how many jobs were available and which employees would have been hired into those jobs is a matter to be resolved in compliance proceedings.
TSUKIJI FARMS, 24 ALRB No. 3

460.00 **FACTORS LIMITING OR TERMINATING LIABILITY**

460.06 Reinstatement Offer as Terminating Employer's Back Pay Liability; Sufficiency of Offer; Substantially Equivalent Employment After Reinstatement

460.06 Employer acted reasonably in serving General Counsel and Union with offers of employment for employees for whom it had no addresses. Since ER was not the initial employer of the

discriminatees, it was not unreasonable that it would lack addresses of its predecessor's employees.

GREWAL ENTERPRISES, INC., 24 ALRB No. 7

460.06 Although contents of employer's letters offering employment to discriminatees was somewhat defiant in tone, the letters repeatedly stated that employees would be treated fairly and thus were not so coercive as to invalidate the offers.

GREWAL ENTERPRISES, INC., 24 ALRB No. 7

463.00 **BARGAINING MAKEWHOLE REMEDY; APPLICABILITY**

463.01 In General

463.01 No makewhole awarded for employer's failure to provide bargaining information requested by union. Makewhole remedy is generally reserved for cases in which employer has engaged in overall course of refusing to bargain or surface bargaining.

TRIPLE E PRODUCE CORP., 23 ALRB No. 8

463.03 Technical Refusal To Bargain (see also section 432.02)

463.03 Where employer did not follow the normal route of review of the Board's decision in a representation matter, but instead sought Leedom v. Kyne direct review in the superior court, Board took into account the likelihood that employer would not prevail on that basis when deciding to invoke the makewhole remedy.

GALLO VINEYARDS, INC., 23 ALRB No. 7

463.03 Where employer's attempt to invoke narrow Leedom v. Kyne standard as grounds for direct review of Board's certification decision raised issues it could have properly asserted before Board and court of appeal on the merits under the broader standard of review, Board could conclude that trial court action was filed for the sole purpose of delaying the bargaining obligation.

GALLO VINEYARDS, INC., 23 ALRB No. 7

463.03 Where review of election certification was available by the normal process of a technical refusal to bargain first before the Board and then in the court of appeal, Respondent failed to demonstrate the need for an extraordinary remedy in equity by its effort to seek direct review in the superior court.

GALLO VINEYARDS, INC., 23 ALRB No. 7

463.03 Where Respondent is on notice that its arguments had previously been considered and rejected by various courts of appeal, filing of Leedom v. Kyne action in superior court did not reflect good faith litigation.

GALLO VINEYARDS, INC., 23 ALRB No. 7

465.00 **REMEDIES AGAINST UNION**

465.10 Denial of Access

465.10 Motion to deny post-certification access under Board regulation section 20900 is denied on grounds that the regulation governs only organizational access, not post-certification access. (L & C Harvesting, Inc. (1993) 19 ALRB No. 19; D'Arrigo Brothers, Admin. Order No. 91-7; The Herb Farm, Admin. Order No. 91-5.)
TRIPLE E PRODUCE CORP., 23 ALRB No. 6

466.00 **MISCELLANEOUS REMEDIAL PROVISIONS**

466.07 Extension Of Certification

466.07 Where Board finds employer's Leedom v. Kyne action was based on an unreasonable litigation posture, initial certification year to begin anew commencing when employer agrees ultimately to recognize union and union responds affirmatively.
GALLO VINEYARDS, INC., 23 ALRB No. 7

501.00 **PRELIMINARY RELIEF AGAINST BOARD OR GENERAL COUNSEL**

501.01 In General - Standard For Judicial Intervention

501.01 Direct review of representation matters available only in narrow situations where there is a plain violation of an unambiguous and mandatory provision of the ALRA, the complaining party is deprived of a right issued to it by the statute, and indirect review through a ULP proceeding is unavailable or patently inadequate.
GALLO VINEYARDS, INC., 23 ALRB No. 7

501.01 Where review of election certification was available by the normal process of a technical refusal to bargain first before the Board and then in the court of appeal, Respondent failed to demonstrate the need for an extraordinary remedy in equity by its effort to seek direct review in the superior court.
GALLO VINEYARDS, INC., 23 ALRB No. 7

602.00 **AGENCY: RESPONSIBILITY OF EMPLOYER FOR CONDUCT
OF OTHERS**

602.01 Apparent Supervisory Authority

602.01 Irrigator/truck driver who in prior years had notified returning workers when they could start working, was acting as employer's agent in discouraging discriminatees from following new hiring procedure by telling them they probably would not get work because of their union activities.

TSUKIJI FARMS, 24 ALRB No. 3

602.01 Although irrigator/truck driver who often directed day-to-day work and had general authority to put people to work who had worked the prior season was not a statutory supervisor, employees would reasonably have perceived him as acting as the employer's agent in making threats that employer was going to plant very little acreage and would hire only non-union supporters the following year. Under standards of *Vista Verde Farms v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 307, an employer may be held responsible for unlawful conduct by a nonsupervisor even if the employer did not direct, authorize or ratify the conduct if the nonsupervisor has apparent authority to speak for the employer.

TSUKIJI FARMS, 24 ALRB No. 3